PERPETUITY, 396-404; 2 JARMAN, WILLS, 6 Am. ed., star pp. 1321, 1323. The words must be capable of the alternate construction before they are subject to the common-law presumption, or fall within the language of the Wills Act. In the principal case the words can hardly import a failure of issue only in B's lifetime or at his death, for obviously they cover the case where B dies leaving issue alive who afterward reach twenty-one. Neither can they reasonably import an indefinite failure of issue, for in such case the qualifying "who shall reach twenty-one" would be without intelligent meaning. A sensible testator could not mean, for example, that if the last of the line of issue died childless at forty, his heirs would keep forever; but that if the same individual died at forty leaving an infant child who died before majority, the gift over should take effect. The words are thus capable of neither construction mentioned in the Wills Act. The testator's intention is not ambiguous. He intended a gift over if no issue of B, living at or before B's death, should reach twenty-one. *Cf. In re Chinnery's Estate*, 1 L. R. Ir. 296. The gift over could take place no later than twenty-one years after the death of B, a living person. It is not too remote.

BOOK REVIEWS

THE NATURE OF THE JUDICIAL PROCESS. By Benjamin N. Cardozo. New Haven: Yale University Press. 1921. pp. 180.

Judge Cardozo has in this book tried his hand at one of those problems which have fascinated the mind of mankind since it began to ponder upon the meaning of law. The position of an English speaking judge, especially, presents an apparent contradiction that has always exercised those who are speculatively inclined. The pretension of such a judge is, or at least it has been, that he declares pre-existing law, of which he is only the mouthpiece; his judgment is the conclusion of a syllogism in which the major is to be found among fixed and ascertainable rules. Conceivably a machine of intricate enough complexity might deliver such a judgment automatically were it only to be fed with the proper findings of fact. Yet the whole structure of the common law is an obvious denial of this theory; it stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.

We have grown more self-conscious of late and can no longer content ourselves with fictions; and candid men like Judge Cardozo will not stomach those equivocations which keep the promise to the ear and break it to the hope. So, while he is aware enough of the limitations upon a judge's freedom, he is more acutely aware than many of his contemporaries of the extent to which he must choose responsibly. His essay tells us of the different factors which may properly enter into a judge's consideration. He must be faithful to the past, of which he is the inheritor, but not too faithful; he must remember that he lays down a rule of general application, — consistency for him is a jewel; but beyond all he must remember that he is a priest of his time, the interpreter of an inarticulate will, which accepts the past only in part, — no more of it than the present has not yet awakened to repudiate.

No quantitative valuation of these elements is possible; the good judge is an artist, perhaps most like a *chef*. Into the composition of his dishes he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests. The test of his success is the measure in which his craftsman's skill meets with general acceptance. There are no *vade mecums* to this or any other art. It

is in the end a question of more or less, and the judicial function lies in the interstices of the social tissues.

That a judge of Judge Cardozo's standing should so frankly own the way in which he works is itself a portent, though in fact he probably disposes of his cases by no saliently different methods from the judges who have preceded him. Indeed he is analyzing, not his own mind alone, but the ways in which all judges decide their cases. But the self-scrutiny which can learn how it works and the candor which will avow it, are rare in such high places. The masters assure us that ours is a time of change in the law, when it is to be recast; one of those periods when the bud is bursting its sheath and the flower unfolding. If they are right — and who are we to question them? — the development will be self-conscious as never before. How Demos will accept it is another matter. Hitherto he has been lulled to rest by unctuous protests of docility from his judges. Will he awaken in a rage when they admit that they are not all "mind," but entertain a "will" as well? Perhaps not; most judges are more pious than Judge Cardozo — and less sincere.

We, who are born in the faith, learned to lisp in our cradles that this is a government of laws, not men. Only yesterday the thunder broke from Olympus and reassured such of us as may have been shaken. From this postulate indeed it followed that the writ of injunction is one of those fundamental rights, any experimentation with which the Constitution forbids. I must confess that this book does not seem orthodox measured by that standard. There is a scandal in so much subjectivity. Mr. Justice Holmes has somewhere said that the lawyer's problem is one in psychology; he must find the personal equation of his judge, a complex (it was before the days of Freud) of all those elements which may influence him, his dialectic propensity, his learning, his deference to the past, his docility to the present, his traditions, his individual habit. It is as if a man were to study the disposition of a pet tiger, another pursuit interesting though perilous, like life. He must reckon with the fundamental biologic tropisms of all sentient creatures; he must know the limitations and capacities of the *Felidae;* he must acquaint himself with the acquired instinctive responses of *Felis tigris;* but chief of all he had better understand the partialities of that particular tiger.

I fancy that if all this be true, the law, which is the greatest common divisor of the sum total of concrete judgments, must in some measure retain a strain of warm humanity about it, which sits a little oddly upon the heights where the Constitution of Massachusetts has placed it. The law is indeed not the creation of this generation, and those who should feel so have no proper place in it. But then this generation was itself scarcely parthenogenetic; and to be human is necessarily to be more than individual. However, after making all allowances, there will be excellent people who cannot help feeling that the voice of this book is in a way the voice of heresy. It will disquiet them even more to know that it emanates from a judge who by the common consent of the bench and bar of his state has no equal within its borders; from one who by the gentleness and purity of his character, the acuteness and suppleness of his mind, by his learning, his moderation, and his sympathetic understanding of his time, has won an unrivaled esteem wherever else he is known. They will be troubled at learning all this; and they will be right to be troubled. When Brutus strikes, we had best fold our togas over our heads and resign our spirits to the darkness. Of course, there is always an escape by concession, by ceasing to climb towards the snowy heights of eternal principles; but they may be unwilling to surrender the truths which have descended to them from the Fathers, tested in the furnaces of experience, burnished by the great hands of the dead, for an opportunism which seeks to cover its usurpation under an affectation of candor. Nor will it much reassure such loyal souls to point to the casual origin of all other institutions, or to let them peep

into the unlovely undercurrents which run below the noble surfaces of even the great and good. But conversion is open to us all, and perhaps this book will prove to be a primer in introspection which may find a way even into the tents of righteousness.

LEARNED HAND.

THE SPIRIT OF THE COMMON LAW. By Roscoe Pound. Boston: Marshall Jones Co. 1921. pp. xiv, 224.

This volume contains the brilliant lectures delivered by Dean Pound in the summer of 1921 as one of the lecturers of the Dartmouth Alumni Lectureships on the Guernsey Center Moore Foundation. Starting with the premise that "if not actually upon trial in the United States, the common law is certainly under indictment," Dean Pound says that it behooves the lawyer "to examine the body of legal tradition on which he relies, to ascertain the elements of which it is made up, to learn its spirit, and to perceive how it has come to be what it is, to the end that we may know how far we may make use of it in the stage of legal development upon which the world has now entered." For such a survey certainly no one could be found better qualified by scholarship, training and experience than Dean Pound.

An examination of our legal tradition discloses two outstanding characteristics, — on the one hand, an extreme individualism; on the other, a tendency to impose duties and liabilities upon men as members of groups or classes, independently of their individual will. Seven factors, the lecturer says, have primarily contributed to these characteristics. They are the Germanic origin of our legal institutions, the feudal law, Puritanism, the contests between the courts and the crown in the seventeenth century, the political ideas of the eighteenth century, the frontier conditions under which American law was developed between the Revolution and the Civil War, and the philosophical ideas with respect to justice, law, and the state that prevailed during this formative period. Six of these have made for individualism. One of them, the feudal law, has given to our legal system a fundamental mode of thought which has always tempered individualism and has supplied the other characteristic of our legal tradition. These seven factors are discussed in the first six lectures. The two remaining lectures are entitled "Judicial Empiricism" and "Legal Reason." They deal respectively with the technique of legal growth and the theory of the end of law which obtains in the new stage of legal development upon which we seem now to be entering.

The method of the lecturer is that of brilliant generalization and of stimulating suggestions of parallelism drawn from legal history. Illustration can better show the method than attempted definition. "Judicial activity must be directed consciously or unconsciously to some end," he says (p. 194). "In the beginnings of law this end was simply a peaceable ordering. In Roman law and in the Middle Ages it was the maintenance of the social *status quo*. From the seventeenth century until our own day it has been the promotion of a maximum of individual self-assertion. Assuming some one of these as the end of the legal ordering of society, the jurist works out an elaborate critique on the basis thereof, the legislator provides new premises for judicial decision more or less expressing the principles of this critique, and the judge applies it in his choice of analogies when called upon to deal with questions of first impression and uses it to measure existing rules or doctrines in passing upon variant states of fact and thus to shape these rules and doctrines by extending or limiting them in different directions. The basis of all these operations is some theory as to what law is for." Or again (p. 69): "In these contests between courts and crown prior to the Stuarts, the courts had been guarding social interests by preventing perversion to quite different uses of powers which